91-981

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No.

IN THE

Supreme Court of the United States

October Term, 1991

JERRY CODAY, *et al.*,

Petitioners,

v.

CITY OF SPRINGFIELD, MISSOURI

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Richard D. Crites
1909 E. Bennett
Springfield, Missouri 65804
(417) 887-8351

Eugene Gressman
(Counsel of Record)
Seton Hall School of Law
1111 Raymond Boulevard
Newark, New Jersey 07102
(201) 642-8844

Counsel for Petitioners

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CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

QUESTIONS PRESENTED

1. Whether in searching state and local law to determine the existence of a constitutionally-protected property interest in the office of city police detective, a federal appellate court is free to disregard state decisional law establishing such an interest where the office is not held "at will."

2. Whether a city council, in exercise of its legislative powers under a city charter, can reduce certain emoluments that are part of a constitutionally-protected property interest in the classified position of city police detective, without regard to due process procedures set forth in the charter and guaranteed by the Fourteenth Amendment.

LIST OF PARTIES

The petitioners before this Court are Jerry Coday, Merrell Coffman, Ray E. Fite, Ted Hobson, George Larbey, Richard Stokes, Charles Upp, and Richard Weter. They were the plaintiffs in the proceedings before the District Court, and the appellees in the proceedings before the Eighth Circuit.

The City of Springfield, Missouri, is the respondent before this Court. It was the defendant before the District Court and the appellant before the Eighth Circuit.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in *Coday, et al. v. City of Springfield, Mo.*, 939 F.2d 666, rendered on July 31, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 939 F.2d 666, and is reprinted in the appendix hereto, p. 2a, *infra*.

The United States District Court for the Western District of Missouri, Southern Division, issued three unreported orders:

1. On January 10, 1990, the District Court granted the

respondent City's motion to dismiss the petitioners' age discrimination and equal protection claims, while denying the motion to dismiss petitioners' due process claim. That order is reprinted in the appendix hereto, p. 10a, *infra*.

2. On April 10, 1990, the District Court granted petitioners' motion for summary judgment on the due process claim and denied the respondent City's counter motion for summary judgment. That order is reprinted in the appendix hereto, p. 15a, *infra*.

3. On April 17, 1990, the District Court denied the respondent City's motion for reconsideration of the April 10 summary judgment order. That denial order is reprinted in the appendix hereto, p. 21a, *infra*.

JURISDICTION

The Eighth Circuit issued its opinion and judgment in this case on July 31, 1991. Petitioners' timely petition for rehearing was denied by the Eighth Circuit on September 20, 1991. See appendix hereto, p. 1a, *infra*. This petition for writ of certiorari is filed within 90 days of the denial of rehearing.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

Section 1, Fourteenth Amendment to U.S. Constitution:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law;
>
> . . .

City Charter of Springfield, Missouri:

Sec. 1.2. The municipal government provided by this Charter shall be known as a "council-manager government." Pursuant to the provisions of this Charter and subject only to the limitation imposed by the state constitution and by this Charter, all powers of the City shall be vested in an elective council, hereinafter referred to as "the council", which shall enact local legislation, adopt budgets, determine policies and appoint the city manager, who shall execute the laws and administer the government of the city.

Sec. 1.3. The city shall have all powers of local self-government and home rule, and all powers possible for any city to have under the constitution and laws of Missouri, or those powers which the legislature would be competent to grant . . .

Sec. 2.10. The council by ordinance may create, change, and abolish offices, departments, or agencies, other than offices, departments and agencies established by this Charter. The council by ordinance may assign additional functions or duties to offices, departments or agencies established by this Charter, but may not discontinue or assign to any other office, department, or agency, any function or duty assigned by this Charter to a particular office, department or agency, except as otherwise provided in this Charter.

Sec. 4.4. . . . The council shall by ordinance provide for the organization of the police department and may classify the members thereof and prescribe their qualifications and duties. . . .

Sec. 6.10. Any employee under the classified service who shall be discharged or reduced in rank or compensation shall be presented with written reasons for such discharge or reduction within five days thereafter. The employee shall have the privilege of a public hearing before the Personnel Board. The Board shall submit its recommendations to the City Manager, who may at his discretion reinstate the employee or restore him to his former rank or compensation provided the decision of the City Manager shall be supported by competent and substantial evidence, which decision shall be reduced to writing stating the reasons therefor. . . .

Sec. 6.11 No person in a classified service or seeking admission thereto, shall be appointed, promoted, reduced, removed, advanced, or retarded on any basis, for any reason other than qualifications, merit, and fitness for the service or lack thereof. Any such actions shall be taken wholly without favoritism or discrimination and on no basis other than provided herein. . .

Sec. 19.7 . . . .The Council shall also, by ordinance not inconsistent with the provisions of this Charter relating to the department of personnel, prescribe maximum and minimum salaries or other compensation for all officers, employees or classes of employees in the classified service of the city. . . .

STATEMENT OF THE CASE

This case involves a search for a state law that creates and defines a constitutionally-protected interest in the position of a city police detective, and the emoluments thereof.

A. The relevant facts

At all material times, seven of the petitioners — Coday, Coffman, Fite, Hobson, Stokes, Upp, and Weter — have been and are employed by the Police Department of the City of Springfield, Mo. Prior to February 15, 1988, they each held the classification or rank of "Police Detective" and the grade of LES-6. The eighth petitioner, Larbey, also has been and is employed by the Springfield Police Department. Prior to February 15, 1988, he held the rank of "Detective (Polygraph Examiner)" and the grade of LES-7.

As employees of the Police Department, the eight petitioners were included in the City's Merit System, which had been established by the City Charter. They were thus entitled to the property entitlements and the due process procedural protections afforded by the City Charter, which had been adopted in 1978 by the vote of the citizens of Springfield.

Sec. 6.11 of that Charter provides that no person in the classified service (like the petitioners)

> . . . shall be appointed, promoted, reduced, removed, advanced, or retarded on any basis for any reason other than qualifications, merit, and fitness for the service or lack thereof. . . and on no basis other than provided herein.

But, if such a person is discharged or reduced in rank or compensation, Sec. 6.10 guarantees that the employee

> . . . shall be presented with written reasons for the discharge or reduction within five days thereafter. The employee shall have the privilege of a public hearing before the Personnel Board. The Board shall submit its recommendations to the City Manager . . . [whose decisions] shall be supported by compe-

> tent and substantial evidence . . . . [and] reduced to writing stating the reasons therefor . . . .

On February 15, 1988, the City Council adopted Council Bill No. 86-16, which abolished the job titles and pay grades which the eight petitioners held, i.e., "Police Detective," an LES-6 pay grade position, and "Detective (Polygraph Examiner)," an LES-7 pay grade position. Without any attempt to comply with the procedural requirements of Sec. 6.10 of the City Charter, Council Bill No. 86-16 summarily directed that those holding either of the foregoing job titles be transferred to the lower rank or classification of "Police Corporal" and that they receive the lower pay grade of LES-5.

Council Bill No. 86-16 also provided that for a period of four years following the effective date of the ordinance, the "Police Corporal" employees, including the petitioners, will continue to receive merit and cost of living wage increases based on their former LES-6 or LES-7 rates of pay. After four years, the LES-5 employees' wages are to be fixed, with no further wage increases until the lower LES-5 rate of pay for "Police Corporal" equals or exceeds the 1988 rate of pay for those in the former LES-6 or LES-7 categories.

In sum, the petitioners were reduced in rank to "Police Corporal" and reduced in compensation to the lower LES-5 category without having received any written notice of the reductions, without having an opportunity for a public hearing, and without having the benefit of any recommendations of the Personnel Board or a written decision by the City Manager — all of which were required by Sec. 6.10 of the City Charter.[1]

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[1]The Eighth Circuit, in its opinion in this case, noted: "In addition to their lower rank and the prospective effect on their wages, the employees imply in their brief that they now have duties and obligations as police corporals that they did not have as detectives, such as working evenings and weekends and buying, wearing, and maintaining police uniforms." App. p. 3a, *infra*.

B. The District Court proceedings

In August of 1989, the eight petitioners instituted this lawsuit in the District Court for the Western District of Missouri, pursuant to 42 U.S.C. § 1983. Jurisdiction was invoked under 28 U.S.C. § 1343. The first amended complaint alleged *inter alia* that Council Bill No. 86-16 deprived the petitioners of a constitutionally-protected property right to hold their respective positions of "Police Detective" and "Detective (Polygraph Examiner)," without according them the due process promised by Sec. 6.10 of the City Charter and therefore guaranteed by the Due Process Clause of the Fourteenth Amendment.[2] Both injunctive and declaratory relief was sought.

The District Court dealt with the critical due process claim in three orders. The first order, dated January 10, 1990, dismissed all of petitioners' claims other than their due process claim. In holding that the equal protection allegations were insufficient to withstand the City's motion to dismiss, the District Court observed that the City

> . . . has given two legitimate governmental interests that are furthered by General Ordinance 88-16. First, the reclassifications of plaintiffs will save defendant [City] more than $32,000 a year. Second,

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[2]Petitioners also alleged that Council Bill No. 88-16 constituted age discrimination, in violation of the Equal Protection Clause of the Fourteenth Amendment, since the petitioners will be more than 40 years old when they lose their right to receive the same pay raises as other LES-6 and LES-7 employees. They further alleged a violation of the Equal Protection Clause in that the ordinance singles out the petitioners from all other Police Department employees. These additional claims were dismissed by the District Court, ruling that neither age nor Police Department employees are suspect classifications. See App. pp. 11a-12a, *infra*. These claims were not renewed before the Eighth Circuit, and they are not presented as Questions to this Court.

> the reclassification increases flexibility of job assignments within the police department.

App. p. 11a,*infra*, The court then held that the ordinance, in depriving the petitioners of their previous ranks as police officers, lowering them to the rank of LES-5, appeared to violate their state-created right to the LES-6 or LES-7 status, since

> . . . According to *Moore v. Damos*, 489 S.W.2d 465, 468 (Mo.App. 1972), a police officer acquires a right or title to the office when he/she is commissioned. Furthermore, he/she acquires a right to the emoluments of the office, including his/her rank. Therefore, the officer's rank is entitled to protection. *Id.* at 468.

App. p. 12a, *infra*.

The District Court, in its January 10 order, further noted that the City Council, in adopting the ordinance, failed to observe the due process procedures mandated by Secs. 6.10 and 6.11 of the City Charter, including the right to a written notice, a public hearing and the receipt of written reasons for any reduction in classified status.

More importantly, the court observed that Sec. 19.7 of the City Charter, upon which the City relies in this case, provides that the City Council shall prescribe compensation for all employees in the classified service by ordinance, provided such ordinance is "*not inconsistent with the provisions of this Charter [including Secs. 6.10 and 6.11] relating to the department of personnel.*" App. p. 13a, *infra* (emphasis added). Thus, the court concluded, the ordinance may have violated the City Charter and the City Council may have exceeded its authority by enacting the ordinance. And, for that reason, the allegations of a due process violation were found sufficient to withstand the City's motion to dismiss. *Id.*

On April 10, 1990, the District Court granted the petitioners' motion for summary judgment on the merits of their due process claim, while denying the City's counter motion for summary judgment on that claim. App. p. 15a, *infra*. The court repeated most of its January 10 analysis supporting petitioners' due process claim, including the finding that state decisional law provides that "a police officer acquires a right or title to the office when he/she is commissioned . . . [and] to the emoluments of the office, including his/her rank." For that proposition, the court again cited *Moore v. Damos*, 489 S.W.2d 465 (Mo. App. 1972). App. p. 19a, *infra*.

The court also considered and rejected the City's argument that the due process procedures mandated by Secs. 6.10 and 6.11 of the Charter were applicable only to administrative disciplinary proceedings, as distinguished from legislative reductions in rank and compensation. The court pointed out that the City Council, acting pursuant to its authority under Sec. 2.10 to create, change, and abolish offices, was still bound by Sec. 19.7 of the Charter to act by ordinance in a manner "not inconsistent with the provisions of this Charter relating to the department of personnel" — to wit, those explicit procedures embodied in Secs. 6.10 and 6.11. App. p. 17a, *infra*.

The District Court denied the City's motion for reconsideration on April 17, 1990. App. p. 21a, *infra*. The order was largely devoted to distinguishing a Missouri case that the City relied upon, *Sanders v. City of St. Louis*, 303 S.W.2d 925 (Mo. 1957). In that case, the St. Louis Charter expressly stated that the rank and salary of certain employees could be changed by a city ordinance, a situation quite unlike that in the instant case. And so the court reiterated that petitioners have "been deprived of property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution." App. p. 22a, *infra*. The City was accordingly "permanently enjoined from enforcing Council Bill No. 88-16." *Id.*

C. The Eighth Circuit proceedings

The City appealed. The Eighth Circuit reversed the District Court's judgment.

The Eighth Circuit concluded "that no constitutionally-protected property interest existed in the employees' positions as detectives." App. p. 5a, *infra*. In so concluding, the court said it was "reviewing state and local law." App. p. 5a, *infra*. But the opinion makes no reference to, or examination of, the state decisional law that the District Court found to be dispositive of the existence of such an interest in this case. Rather, the Eighth Circuit bases its decision "primarily on an examination of the city's charter." *Id.*[3] On that basis the Eighth Circuit holds:

1. Petitioners have no property interest because, under the Charter, the City Council has total power over the organization and operation of the police department, with Sec. 19.7 giving the Council express power to establish maximum and minimum salaries for all employees in the classified city service. App. pp. 5a-6a, *infra*. Thus, under the court's theory, the Council can pass an ordinance reducing petitioners' classification and compensation without according them any procedural due process.

2. The Eighth Circuit fails to recognize that this Sec. 19.7 legislative power, by its own terms, can be exercised only "by ordinance not inconsistent with the provisions of this Charter relating to the department of personnel." Any such ordinance must thus be consistent with the Charter provisions governing those (like petitioners) in the department of per-

[3]In looking to the Charter provisions as indicia of "state law" to find if petitioners had a constitutionally-protected property interest, the Eighth Circuit cited *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), for the proposition that "property interests" are to be found not in the Constitution, but rather in "existing rules or understandings that stem from an independent source such as state law . . ."

sonnel. In short, the Eighth Circuit neglects to mention that the ordinance must be consistent with Secs. 6.10 and 6.11, which deal with the procedural rights of those in the department of personnel.

3. The due process procedures guaranteed by Secs. 6.10 and 6.11, said the Eighth Circuit "apply only to administrative actions, such as promotion or discipline of employees, [and] do not limit or preclude the city council's legislative authority to make necessary policy and budget decisions; they do not somehow override the express authority for the city council's actions in Sections 4.4 and 19.7; and, thus, they do not create a constitutionally-created property interest that prohibits the city council from passing the ordinance at issue in this case." App. pp. 6a-7a, *infra*.

4. The Eighth Circuit sought support for its distinction between administrative and legislative action by reference to the Missouri Supreme Court's decision in *Sanders v. City of St. Louis*, 303 S.W.2d 925 (Mo. 1957). The *Sanders* ruling had been distinguished by the District Court on the ground that the St. Louis charter, unlike the Springfield charter, made titles and rates of pay of the classified employees permissive rather than mandatory. See App. pp. 21a-22a, *infra*.

REASONS FOR GRANTING THE WRIT

1. The decision below raises important and unique problems in identifying constitutionally-protected property interests.

The Eighth Circuit premised its search for a constitutionally-protected property interest in this case on this Court's oft-repeated proposition that such interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Board of Regents v. Roth*, 4078 U.S. 564, 577 (1972). But the Eighth

Circuit's search for that "state law" in this case has deviated so far off the *Roth* path as to create several important and unique problems worthy of this Court's attention.

A. The Conflict with Roth

A critical part of the Eighth Circuit's search directly conflicts with the basic teaching of *Roth*. The court concentrated its search for "state law" solely on the provisions of the City Charter. It thereby ignored what the District Court twice found (see App. pp. 13a, 19a, *infra*) to be the controlling state judicial precedents. Those precedents, which are applicable to police officers in Springfield and other Missouri cities where officers can be discharged only for cause, hold that "a police officer, when he is commissioned, acquires a right or title to the office and its emoluments and such privilege is entitled to protection." *Moore v. Damos*, 489 S.W.2d 465, 468 (Mo.App. 1972). Identical description of the Missouri law, conferring a property interest on police officers when they are commissioned, is found in *Scism v. Long*, 280 S.W.2d 481, 483 (Mo.App. 1955); *Davis v. Long*, 360 S.W.2d 307, 311 (Mo.App. 1962); *Heidebur v. Parker*, 505 S.W.2d 440, 444 (Mo.App. 1974).

This Missouri decisional law was fully briefed and argued by petitioners before the Eighth Circuit.[4] The court's failure to acknowledge or address or distinguish such case law can only be described as deliberate. That failure raises this question: Does the *Roth* search doctrine permit a federal appellate

[4]Petitioners in their brief below brought these four Missouri precedents to the attention of the Eighth Circuit. See Brief of Appellees, pp. 20-23, under the heading "Missouri Caselaw Gives Police Officers Protected Property Rights to their Rank, Compensation and Emoluments of Office." But the City made no mention of these precedents in its Brief of Appellant or in its Reply Brief of Appellant.

court to ignore such authoritative state court rulings that define the protected contours of a property interest? One would think not. One would also think that state judicial precedents, along with state statutes, would be the first and primary place to look when engaging in the *Roth*-type search for applicable "state law." See *Bishop v. Wood*, 426 U.S. 341, 344-347 (1976) (*Roth*-type inquiry into North Carolina decisional law revealed no protectible property interest of city police officers); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9-10 (1978) (engaging in a *Roth*-type search and finding a protectible property interest for utility consumers in "Tennessee decisional law").

And so the Eighth Circuit's refusal to consider, let alone apply, the four Missouri precedents appears to be at war with the guidelines set by *Roth* and its progeny. That refusal creates a dangerous precedent. Left unreviewed, the decision below may encourage other courts and other cities to ignore statewide judicial precedents and to rely solely on local organic law, thereby possibly destroying or limiting a state-created property interest of police officers or other civil servants.

B. The Charter misinterpretation

In its search of state and local law, the Eighth Circuit's reading of the Springfield Charter is indefensible. It results in the destruction of property interests that the Charter was designed to create and preserve. This further underlines the conflict with the *Roth* guidelines for searching "state law."

Secs. 6.10 and 6.11 combine to establish that civil service employees, such as the petitioning police officers, can be "discharged or reduced in rank or compensation" only for good cause, following specified due process procedures. And the Council's legislative power to organize the police department

and to prescribe the compensation of its members is expressly conditioned on consistency and compliance with such Charter provisions as Secs. 6.10 and 6.11. See Sec. 19.7.

Properly read, these Charter provisions fit neatly into the Missouri decisional law respecting a police officer's "right or title" to the office, including the "emoluments" of ranks and compensation attached thereto.[5]

A clearer state and local expression of a constitutionally-protected property interest is difficult to imagine. Cf. *Bishop v. Wood*, 426 U.S. 341 (1976), where the state decisional law made a police officer's employment "at will." The very fact that the police officers in this case are part of the city's civil service system disposes of any notion that they serve only "at will."

Moreover, District Judge Russell G. Clark, who sits in the federal court in Springfield and who prior to his elevation to the bench in 1977 had practiced law for 25 years in Springfield,[6] found that the state decisional law as well as the Charter gives the petitioners a protectible property interest in their positions and the emoluments thereof. Since that finding is at least a plausible and tenable interpretation of both the state law and the Charter, *Bishop v. Wood*, 426 U.S. at 346, teaches that such a finding forecloses the Eighth Circuit from making an

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[5]Under Missouri law, the word "emoluments" means the profit and rank "which is annexed to the possession of office, as salary, fees, and perquisites." *State v. Dishman*, 334 Mo. 874, 68 S.W.2d 797, 798 (1934).

Should there be any conflict between a state court decision of statewide application and any provision of a local charter or ordinance, the state court decisional law would prevail. See *West Chicago Street R. Co. v. Illinois*, 201 U.S. 506, 521 (1906).

[6]In *Bishop v. Wood*, 426 U.S. at 345-346, this Court found that the District Court's understanding of North Carolina state law and the construction of the city ordinance in question were made all the more tenable by virtue of the fact that the District Judge in that case "sits in North Carolina and practiced law there for many years." *Id.* at 345.

independent examination of the matter "even if an examination of the state-law issue without such guidance might have justified a different conclusion."

C. The legislative-administrative distinction

Another questionable aspect of the Eighth Circuit's analysis is its reading of the Charter's due process procedures (Sec. 6.10) as being applicable to the petitioners only if they are subjected to administrative proceedings of a disciplinary nature. Due process is apparently not necessary when the City Council alters protected property rights by enacting an ordinance in the Council's legislative role.

Sec. 19.7, however, expressly conditions the legislative power respecting compensation of classified service employees upon consistency with the due process provisions of the Charter. Thus the Springfield voters, by approving Sec. 19.7, have placed a due process limitation on the exercise of the Council's legislative powers.

In any event, the Eighth Circuit has created a unique and dangerous method for circumventing the constitutional right to procedural due process once a protected property right has been identified. That method is to confine the protection to administrative proceedings, freeing the local legislature to do whatever it desires with respect to the property right. Presumably it can destroy or dilute the property interest solely for political or budgetary reasons, which is probably why the citizens of Springfield voted in favor of a civil service system and imposed the Sec. 19.7 limit on the Council's legislative authority.

At least since *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), no court has ever suggested that legislative action, be it at the state or local level, is immunized from constitutional

restraints. But now that the Eighth Circuit has crafted just such a legislative immunity, review of its decision becomes imperative.

D. The emoluments issue

The ruling below also raises the unique question whether the procedural due process requirements of the Fourteenth Amendment apply only to a discharge from protected employment. Or do those requirements apply equally to alterations and reductions of the protected emoluments of such employment, such as reductions in rank and compensation?

Both the Missouri decisional law and the Springfield Charter expressly protect police officers and other civil service employees from dilution of the emoluments attached to their offices. But none of the *Roth* line of decisions of this Court has addressed the procedural due process implications of anything less than a total destruction of a protected property interest, such as an arbitrary discharge or summary dismissal for political reasons. See, e.g., *Branti v. Finkel*, 445 U.S. 507 (1980), involving termination for partisan political reasons.

Conceptually and constitutionally, there appears to be no reason to withhold due process protections from those governmental employees who suffer reductions in their emoluments of office, emoluments that the state and local law expressly declares to be component parts of their property rights and titles. That the local authorities may seek to reduce those emoluments for purely budgetary reasons only heightens the tension between the employee's protected property interest and the government's fiscal responsibilities. At this time, when many governmental units are faced with budgetary crises and a desire to reduce employment costs, it is appropriate for this Court to address this impasse.

2. The questions raised in this case are of nationwide importance.

The foregoing questions that arise out of the Eighth Circuit's opinion represent concerns that far exceed the parochial interests of these eight police officers.

These eight petitioners are typical of the many thousands of municipal service employees throughout the United States. The 1991 edition of the Statistical Abstract of the United States reveals the following statistics concerning city government employment as of 1988:[7]

	All cities	Cities of 75,000 or more
Total number employed	2,570,000	1,493,000
Total police personnel	400,000	219,000

We can safely say that the vast majority of these city government employees, particularly those in the larger cities, are covered by some sort of civil service protections. Those are the ones that are put in jeopardy by the Eighth Circuit's ruling that city legislative bodies are free to override or reduce various elements or emoluments of constitutionally-protected property interests in governmental employment.

This nation is now in the midst of a recession, fueled in part by a significant decline in federal aid to municipalities. Most cities are experiencing severe fiscal problems. And because the cost of labor is one of the highest costs of doing a city's business, there are strong political and economic pressures to reduce employees' wages and to demote employees to lower-pay classifications, just as happened in this case. Unless

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[7]Statistical Abstract of the United States (111th ed. 1991, U.S. Dept. of Commerce, Bureau of the Census). The above statistics are taken from Table 50, p. 310. In addition, the 1990 census reveals that Springfield, Mo. has a population of 140,000. Table 40, p. 36.

the Eighth Circuit's opinion is reviewed and reversed, those pressures will inspire city councils and other local legislative bodies to save money by reducing the emoluments of public service and relegating procedural due process guaranties to the relatively few instances of dismissal for cause.

It is significant that the Springfield Charter is the product of the voting citizens of that city. They have determined that the City Council shall not have power to enact ordinances that deplete or reduce the rank or compensation of city employees, at least without according the employees some semblance of due process. Only last November 5, 1991, the voters of Springfield rejected an attempt to remove a variety of assistants to department heads, division heads, and police majors from the city's merit system, thereby saving thousands of dollars.[8] That indicates a strong and continuing public support not only for the city's merit system but for continued resistance to efforts to dilute the strength of the public's commitment to protect the employees' right and title to their governmental positions, as well as the emoluments thereof.

[8]The vote rejecting such an amendment to the Charter was 13,835 to 11,247. The Springfield News-Leader, Nov. 6, 1991, p. 4A.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Richard D. Crites
1909 E. Bennett
Springfield, Missouri 65804
(417) 887-8351

Eugene Gressman
(Counsel of Record)
Seton Hall School of Law
1111 Raymond Boulevard
Newark, New Jersey 07102
(201) 642-8844

Counsel for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 90-1798WM

Jerry Coday, Merrell Coffman, *et al.*,
Appellees,

vs.

City of Springfield, Missouri, a municipal corporation,
Appellant.

Appeal from the United States District Court for the Western District of Missouri

Appellee's petition for rehearing has been considered by the court and is denied.

September 20, 1991

Order Entered at the Direction of the Court:

/s/Michael E. Gans
Clerk, U.S. Court of Appeals
Eighth Circuit

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 90-1798

Jerry Coday, Merrell Coffman, Ray E. Fite, Ted Hobson, George Larbey, Richard Stokes, Charles Upp, Richard Weter,

Appellees,

v.

City of Springfield, Missouri, a municipal corporation,

Appellant.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: November 15, 1990
Filed: July 31, 1991

Before BOWMAN and BEAM, Circuit Judges, and HARRIS,* Senior District Judge.

BEAM, Circuit Judge.

The City of Springfield, Missouri, passed an ordinance changing the job titles and prospectively affecting the pay grades of detectives employed in its police department. Appellees brought this lawsuit claiming that they were being deprived of a property interest in their jobs without due process of law. The district court granted their motion for summary judgment. We reverse.

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*The HONORABLE OREN HARRIS, Senior United States District Judge for the Eastern and Western Districts of Arkansas, sitting by designation.

I. BACKGROUND

On February 15, 1988, the Springfield City Council adopted General Ordinance No. 3896, which deleted the job titles of "Police Detective" and "Detective (Polygraph Examiner)" from the city code and transferred the persons in those positions to the job position of Police Corporal. Before the city council passed this ordinance, the appellees were all employed by the city as detectives. According to the city's ordinance, the employees, as police corporals, will continue to receive wage increases at their former rate of pay for a period of four years from the date of the passage of the ordinance. After four years, the employees' wages are to be fixed, with no further wage increases, until the lower rate of pay for Police Corporal equals or exceeds their rate of pay.

In August 1989, the employees brought this lawsuit pursuant to 42 U.S.C. §1983 (1988), alleging, *inter alia*, deprivation of a constitutionally-protected property interest without due process of law. In addition to their lower rank and the prospective effect of their wages, the employees imply in their brief that they now have duties and obligations as police corporals that they did not have as detectives, such as working evenings and weekends and buying, wearing, and maintaining police uniforms. Brief for Appellees at 9. The city, on the other hand, in addition to denying any violation of due process, asserts that its ordinance will save "more than $32,000 a year" and increase "flexibility of job assignments within the police department." *Coday v. City of Springfield*, No. 89-3299-CV-S-4, Order at 2 (W.D. Mo. Jan. 10, 1990).

The district court granted the employees' motion for summary judgment and enjoined the city from enforcing its ordinance. The court based its decision primarily on the Springfield City Charter. The court observed that according to the charter the administrative service of the city is divided

into two groups of personnel, unclassified service and classified service, and that the employees in this case are included in the latter group. As classified employees, the district court explained, they are entitled to the protecton of section 6.11 of the Springfield City Charter. Section 6.11 provides, in part:

> No person in a classified service or seeking admission thereto, shall be appointed, promoted, reduced, removed, advanced, or retarded on any basis for any reason other than qualifications, merit, and fitness for the service or lack thereof. Any such actions shall be taken wholly without favoritism or discrimination and on no basis other than provided herein.

Springfield, Mo., City Charter § 6.11. The district court concluded that this charter provision gave the employees a property interest in their jobs as detectives and that the city council had violated this provision by "reducing" the employees to the rank of Police Corporal on a basis other than qualifications, merit, or fitness for service.

Furthermore, according to the district court, the employees are entitled to the protection of section 6.10 of the city charter. Section 6.10 provides, in part: "Any employee under the classified service who shall be discharged or reduced in rank or compensation shall be presented with written reasons for such discharge or reduction within five days thereafter. The employee shall have the privilege of a public hearing before the Personnel Board." *Id.* at § 6.10. The district court concluded that because "[n]one of these procedures were followed by the [city] with respect to [the employees'] reductions in rank," the city council's ordinance violated that charter. *Coday v. City of Springfield*, No. 89-3299-CV-S-4, order at 3-4 (W.D. Mo. April 10, 1990). According to the district court, the city "must amend its charter before it may" pass an or-

dinance such as the one involved in this case. *Id.* at 5.

II. DISCUSSION

Our standard for review of a summary judgment is the same well-established standard applied by the district court. Thus, we will affirm the district court's decision if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed R. Civ. P. 56(c). In making this determination, we view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in the non-moving party's favor. *See FDIC v. Virginia Crossings Partnership*, 909 F.2d 306, 309 (8th Cir. 1990).

To determine whether the employees in this case have a property interest in their employment as detectives, we must look, as the district court did, to the state and local law to see how the detective positions were created and defined. In *Bishop v. Wood*, 426 U.S. 341 (1976), the Supreme Court explained, " 'Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .' " *Id.* at 344 n.7 (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). After reviewing state and local law, we conclude that no constitutionally-protected property interest existed in the employees' positions as detectives.

Our decision, like the district court's, is based primarily on an examination of the city's charter, which gives a broad grant of authority to the city council. According to sections 1.2 and 1.3, the city government has all powers possible under the law, including any not explicit in the charter, and all the powers of the city are vested in its elected council. *See Springfield, Mo., City Charter* §§ 1.2, 1.3. The charter also expressly provides

for the city council's power over the organization and operations of the police department. Section 4.4 states, in part:

> The police department shall preserve peace and order, enforce the city ordinances, prevent crime, detect and apprehend violators of all laws and ordinances, regulate traffic and perform such other duties relating to public peace, order and safety as the council shall prescribe.
>
> . . .
>
> The council shall by ordinance provide for the organization of the police department and may classify the members thereof and prescribe their qualifications and duties.

Id. § 4.4. Furthermore, section 19.7 expressly provides the city council with the power to establish the maximum and minimum salaries for employees in the classified service of the city. *Id.* § 19.7.

The district court is correct that the employees in this case are entitled to the protections of section 6.10 and 6.11 of the city charter. But the district court has misinterpreted the scope of those sections.[1] Sections 6.10 and 6.11 — which are contained within Article VI of the charter, labeled "Department of Personnel" — apply only to administrative actions, such as the promotion or discipline of employees. They do not limit or preclude the city council's legislative authority to make necessary policy and budget decisions; they do not somehow override the express authority for the city council's actions

[1]Indeed, if we followed the rationale of the district court, all city employees in the classified service would have a constitutionally-protected property interest in their jobs, job titles, job duties, etc., which, for the duration of their employment, could not be abolished or altered in any way by the city's legislative body.

in sections 4.4 and 19.7; and, thus, they do not create a constitutionally-protected property interest that prohibits the city council from passing the ordinance at issue in this case.

A similar distinction between legislative and administrative action was explained in the Missouri Supreme Court's decision in *Sanders v. City of St. Louis*, 303 S.W.2d 925 (Mo. 1957), a case involving interpretation of the charter for the City of St. Louis. In *Sanders*, the Board of Aldermen of the City of St. Louis passed an ordinance that changed the job title of "Heavy Equipment Operator" to "Street Cleaning Equipment Operator" and immediately reduced the wage scale and salary of those employees. *Id.* at 927. All of the employees affected were in the classified service of the city. They brought a lawsuit claiming that the city's ordinance was in "direct violation" of the Charter of the City of St. Louis and the Rules of the Civil Service Commission, which prohibited any reduction in pay except " 'on the sole basis of merit and fitness.' " *Id.*, at 928 (quoting Charter Art. XVIII, sec. 2(2); Rule II, sec. 1(a)). The Missouri Supreme Court rejected the employees' claim and stated that

> [t]he charter is the city's organic law and bears the same relation to its ordinances that the constitution of a state bears to its statutory enactments, but that does not mean that the Board of Aldermen is powerless to exercise its legislative functions and reclassify civil service employees and their pay within the reasonable limitations of Article XVIII.

Id. (citation omitted).[2] The court further noted that "[t]he ordi-

[2]To look, by analogy, at other cases involving city charters is problematic: the cases do not contain the full text of each charter and a court, as in *Sanders*, sometimes bases its decision on charter provisions too numerous to "set forth." Sanders, 303 S.W.2d at 930. The problems, however, are not so difficult and the charter provisions not so unique that we should

nance was not an 'administrative' reduction in salary, it was a 'legislative' determination of munipical policy." *Id.* at 929. The court concluded that because the employees did "not demonstrate that the changes in pay and title were so unreasonable, arbitrary or capricious as to violate either the letter or spirit of the charter," their lawsuit was properly dismissed by the lower court. *Id.*[3]

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entirely ignore these other decisions, as the employees in the present case seem to argue. *See* Brief for Appellees in at 36-37 (stating that a "rose may be a rose, but a charter is not a charter" and that this court "cannot take judicial notice of the St. Louis City Charter in effect in *Sanders*").

[3]The district court also considered *Sanders* and decided that "there were some significant differences between the 1957 charter of the city of St. Louis and the current charter of the city of Springfield, Missouri." *Coday v. City of Springfield*, No. 89-3299-CV-S-4, Order at 1 (W.D. Mo. April 17, 1990). As an example, the district court noted that the St. Louis charter in *Sanders* contained a provision which stated that the employees' titles and rates of pay were "permissive only" and not "mandatory." The district court observed that "there is no language in the Springfield charter that indicates that ranks or salaries of classified employees are permissive and subject to change." *Id.* at 2.

It is impossible, of course, to glean all of the similarities and differences between the two charters from the Missouri Supreme Court's opinion. We are certain, however, that the Missouri court's decision was *not* based on the fact that the St. Louis charter stated that ranks and salaries are "permissive only." According to our reading of *Sanders*, the "permissive only" language was quoted in a larger context, which addressed an argument advanced by the *employees*.The charter's "permissive only" language did not serve as a basis for the court's decision that the board of aldermen had a legislative authority to pass the ordinance.

III. Conclusion

For the reasons stated, the order of the district court granting the employees' motion for summary judgment is reversed and the district court is instructed to enter summary judgment in favor of the city.

A true copy.

Attest: /s/Michael E. Gans
Clerk, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

Filed
JAN 10 1990

No. 89-3299-CV-S-4

JERRY CODAY, *et al.*,.

Plaintiffs,

vs.

CITY OF SPRINGFIELD, MISSOURI,

Defendant.

ORDER

This matter comes before the Court on defendant's motion to dismiss the first amended complaint, which was filed with suggestions on October 26, 1989. On November 21, 1989, plaintiffs filed a reply to the motion to dismiss. For the following reasons, defendant's motion will be granted in part and denied in part.

Before addressing the merits of defendant's motion, the Court will summarize the undisputed facts. On February 15, 1988, defendant's City Council adopted Council Bill No. 88-16, which abolished the job titles and pay grades of police detective, an LES-6 position, and detective (polygraph examiner), an LES-7 position. Those employees who were police detectives or detectives on or before February 15, 1988 were transferred to the rank of police corporal, an LES-5 position. LES-5 is a lower pay grade than LES-6 or LES-7. General Ordinance 88-16 provides that those who held the police

detective classification or the detective classification as of the date of its passage will continue to receive the same pay raises as others who are classified as LES-6 or LES-7 for the first four years. Thereafter, those individuals will not receive any additional pay increases until their pay is equaled or exceeded by the pay of police corporal. Plaintiffs have requested declaratory and injunctive relief.

In their first amended complaint, plaintiffs have alleged that the aforementioned ordinance constitutes age discrimination and an equal protection violation because all affected personnel will be more than 40 years old when they lose their right to receive the same pay raises as other LES-6 and LES-7 employees. Plaintiffs allege that individuals over the age of 40 constitute a suspect class. However, age is not a suspect class. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307; 313-14. Therefore, the classification will pass constitutional muster if the classification is rationally related to furthering a legitimate governmental interest. *Id.* at 312. Even a federal age discrimination statute states that "where the differentiation is based on reasonable factors other than age," the employer has not acted illegally. 29 U.S.C. § 623.

In the instant case, defendant has given two legitimate governmental interests that are furthered by General Ordinance 88-16. First, the reclassification of plaintiffs will save defendant more than $32,000 a year. Second, the reclassification increases flexibility of job assignments within the police department. Neither of these interests relates to age.

Similarly, plaintiffs have alleged an equal protection violation based upon the fact that the ordinance singles them out from all other police department employees. Policemen also are not a suspect class. As already explained, the ordinance furthers two legitimate governmental interests. Therefore, this Court finds that the ordinance does not deny plaintiffs'

the equal protection of the laws. Accordingly, plaintiffs' age discrimination and equal protection claims will be dismissed.

Plaintiffs also have alleged that the ordinance deprives them of a property right without due process of law. For the following reasons, this Court agrees. This ordinance deprived plaintiffs of their previous ranks as police officers. Their ranks were lowered from LES-6 or LES-7 to LES-5. According to *Moore v. Damos*, 489 S.W.2d 465, 468 (Mo. App. 1972), a police officer acquires a right or title to the office when he/she is commissioned. Furthermore, he/she acquires a right to the emoluments of the office, including his/her rank. Therefore, the officer's rank is entitled to protection. *Id.* at 468.

Generally, it is true that if the statute authorizing a benefit is amended or repealed, the property right no longer exists. *Jones v. Reagan*, 748 F.2d 1331, 1338-39 (1984). However, in *Jones* the Supreme Court noted that Congress did not exceed its constitutional jurisdiction by enacting a law that terminated free medical care for seamen. *Id.* at 1336. On the other hand, the ordinance at issue in the instant case appears to violate provisions of defendant's City Charter. If a City Charter is analogous to the Constitution, then the City Council may have exceeded its jurisdiction by adopting the ordinance.

Article VI, Section 6.11 of the Charter provides in part that: "No person in a classified service . . . shall be . . . reduced, removed, . . . or retarded on any basis for any reason other than qualifications, merit, and fitness for the service or lack thereof. . . ." Undisputedly, plaintiffs were police detectives or detectives when the ordinance was adopted. Article VI expressly provides that the defendant's police officers, other than the Chief of Police, are members of the defendant's "classified service." Furthermore, Article VI provides that

employees of the classified service shall be given written reasons for any reduction in rank within five days after the reduction. Moreover, the affected employees are entitled to a public hearing before the defendant's personnel board. The defendant failed to follow these procedures. Finally, Section 19.7 of the defendant's City Charter states that the Council shall prescribe compensation for all employees in the defendant's classified service "by ordinance not inconsistent with the provisions of this Charter relating to the department of personnel. . . ." The quoted language refers to Article VI, including Seciton 6.11, which already has been discussed.

Therefore, it appears that General Ordinance 88-16 may violate the defendant's City Charter. If so, defendant's City Council may have exceeded its authority by enacting the ordinance in question. Accordingly, plaintiffs have alleged a due process violation sufficient to withstand a motion to dismiss. A motion to dismiss cannot be granted unless it appears beyond a doubt that claimants can prove no set of facts in support of their claim which would entitle them to relief. *United States v. Aceto Agr. Chemicals Corp.*, 872 F.2d 1373, 1376 (8th Cir. 1989).

This Court is not ruling on the merits of this action at this time. However, it does appear that plaintiffs may have suffered immediate harm and irreparable injury, notwithstanding defendant's argument to the contrary. As of the effective date of the ordinance, plaintiffs sustained a reduction in rank. As previously discussed, a police officer's rank is entitled to protection. *Moore v. Damos*, 489 S.W.2d 465, 468 (Mo. App. 1972). Therefore, at this time the Court cannot adopt defendant's contention that plaintiffs are not entitled to declaratory or injunctive relief.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss the age discrimination and equal protection claims is granted; and it is further

ORDERED that defendant's motion to dismiss the alleged due process violation is denied.

/s/Russell G. Clark

RUSSELL G. CLARK, JUDGE
UNITED STATES DISTRICT COURT

Date: January 10, 1990

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

No. 89-3299-CV-S-4

Filed
APR. 10, 1990

JERRY CODAY, *et al.*,

Plaintiffs,

vs.

CITY OF SPRINGFIELD, MISSOURI,

Defendant.

ORDER

This matter comes before the Court on cross motions for summary judgment. As set forth below, the Court will grant plaintiff's motion for summary judgment and will deny defendant's motion for summary judgment.

Before addressing the merits of the motions, the Court briefly will set forth the undisputed facts of this case. Prior to February 15, 1988, plaintiffs Coday, Coffman, Fite, Hobson, Stokes, Upp, and Weter were employed by Defendant City of Springfield, Missouri in its police department. They held the classification or rank of "police detective" and the grade of LES-6. Prior to February 15, 1988, plaintiff Larbey also was employed by defendant City of Springfield, Missouri in its police department. He held the classification or rank of "detective (polygraph examiner)" and the grade of LES-7. On February 15, 1988, defendant's City Council adopted General Ordinance No. 88-16, which deleted the job titles and pay grades for LES-6 police detective and LES-7 detective (polygraph examiner). Employees holding those classifications

were transferred to the LES-5 classification of police corporal as of the effective date of the ordinance. The affected employees, including plaintiffs, will continue to receive wage increases at the LES-6 and LES-7 ranks for a period of four years from the date of the passage of the ordinance. At the end of the four years, the wages of the employees who held the ranks of police detective and detective (polygraph examiner) are to be fixed with no further wage increases until the lower rate of pay for the police corporal equals or exceeds the rate of pay for any employees who held the ranks of police detective and detective (polygraph examiner) as of the effective date of the ordinance.

Plaintiffs filed suit alleging that the aforementioned ordinance constitutes age discrimination, an equal protection violation, and a due process violation. They requested declaratory and injunctive relief. In an order entered January 10, 1990, this Court granted defendant's motion to dismiss with respect to the age discrimination and equal protection claims, but denied the motion with respect to the alleged due process violation.

In its supplemental suggestions in support of defendant's motion for summary judgment, defendant cites Section 2.10 of the City Charter in support of the City Council's authority to delete job positions in the City service. Section 2.10 provides in part: "The council by ordinance may create, change, and abolish offices, departments, or agencies, other than the offices, departments and agencies established by this Charter." Section 4.3 establishes a city police department and requires the appointment of a chief of police. The chief of police is the only officer specifically mentioned by the charter. However, Section 4.4 requires the council to provide for the organization of the police department and permits the council to classify the members of the police department by ordinance.

Although the ranks or classifications of police detective and detective (polygraph examiner) were established by ordinance, the authority to create them was derived from Section 4.4 of the City Charter.

Furthermore, defendant has failed to address Section 6.11 of the City Charter. Section 6.11 provides in part: "No person in a classified service or seeking admission thereto, shall be appointed, promoted, reduced, removed, advanced, or retarded on any basis for any reason other than qualifications, merit and fitness for the service or lack thereof." Section 6.5(2) states that any positions not specifically included in the unclassified service are included in the classified service and should receive the protection afforded by Section 6.11. Defendant has not alleged that plaintiffs' ranks were reduced on the basis of qualifications, merit, or fitness. It appears that the ordinance at issue violates the Springfield City Charter.

Moreover, Section 6.10 states that a classified employee must receive written reasons for his/her reduction in rank within five days thereafter. Also, this section gives the affected employee the privilege of a public hearing before the Personnel Board. None of these procedures were followed by the defendant with respect to plaintiffs' reduction in rank. In its suggestions in support of its motion for summary judgment, defendant argued that these procedures apply to only disciplinary proceedings. It is true that the cases cited by plaintiffs do involve terminations or reductions in rank for disciplinary reasons. However, defendant's attempt to distinguish administrative disciplinary proceedings from legislative authority has not been successful. Defendant cited cases for the proposition that a governmental entity has legislative authority to reduce an employee's classification or rank. As already dicussed, it appears that the ordinance at issue in this case violates provisions of the Springfield City Charter.

Therefore, defendant's City Council lacked legislative authority to enact said ordinance. Furthermore, the cases cited by defendant do not involve a violation of a city charter or a state constitution.

For example, in *State v. Davis*, 418 S.W.2d 163 (Mo. 1967), the city council of Kansas City challenged proposed charter amendments that would reduce the terms of the mayor, councilmen, and municipal judges from four years to two years. *Id.* at 165-66. If passed, the amendments would have shortened the term of those already in office. *Id.* at 168-69, 172. The Court concluded that the people of Kansas City had the right to amend their charter and therefore had the right to vote on the proposed amendments. *Id.* at 172. In the instant case,there is little doubt that plaintiffs' ranks or classifications could be abolished by charter amendment. Section 19.28 of the Springfield City Charter provides an amendment process. However, the defendant does not have the right to abolish these positions by passing an ordinance that violates an explicit charter provision (Section 6.11).

Likewise in *O'Neil v. Baine*, 568 S.W.2d 761 (Mo. banc 1978), the Court held that mandatory retirement at age 70 for certain state court judges does not violate due process. *Id.* at 761, 767-68. In reaching this conclusion, the Court noted that manadatory retirement is constitutionally permissible because of an amendment to the state constitution that permitted the state legislature to establish judicial qualifications such as mandatory retirement. Once again, the City Charter of Springfield, Missouri does not permit the defendant to reduce the ranks of its classified personnel except for "qualifications, merit, and fitness for the service or lack thereof." Defendant must amend its charter before it may reduce said ranks for any other reason.

According to *Moore v. Damos*, 489 S.W.2d 465 (Mo. App. 1972), a police officer acquires a right or title to the office when he/she is commissioned. He/she also acquires a right to the emoluments of the office, including his/her rank. Therefore, the officer's rank is entitled to protection. *Id.* at 468. In the suggestions supporting its motion for summary judgment, defendant cited *Jones v. Reagan*, 748 F.2d 1331 (9th Cir. 1984) for the proposition that a property right no longer exists if the statute authorizing a benefit is amended or repealed by the legislature. *Id.* at 1228-39. However, as noted in the Court's order entered January 10, 1990, Congress did not exceed its constitutional jurisdiction by enacting a law that terminated free medical care for seamen. *Id.* at 1336. On the other hand, the ordinance at issue in the instant case clearly violates provisions of defendant's City Charter. Therefore, the ordinance at issue in this case does constitute a due process violation.

It is

ORDERED that defendant's request for oral argument pursuant to Local Rule 13(f) is denied; and it is further

ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that the plaintiff's motion for summary judgment is granted; and it is further

ORDERED that Council Bill No. 88-16 violates the rights of the plaintiffs guaranteed them by the Fifth and Fourteenth Amendments to the United States Constitution by depriving them of property without due process of law; and it is further

ORDERED that defendant is permanently enjoined from enforcing Council Bill 88-16 and the terms of defendant's general ordinance, section 2-29.1 of the City Code of the City of Springfield, Missouri, as amended by Council Bill 88-16.

/s/Russell G. Clark

RUSSELL G. CLARK, JUDGE
UNITED STATES DISTRICT COURT

Date: April 10, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

No. 89-3299-CV-S-4

Filed
APR 17, 1990

JERRY CODAY, *et al.*,

Plaintiffs,

vs.

CITY OF SPRINGFIELD, MISSOURI,

Defendant.

ORDER

This matter comes before the Court on defendant's motion for reconsideration. On April 10, 1990, this Court entered an order granting plaintiffs' motion for summary judgment and denying defendant's motion for summary judgment. As set forth below, the court will deny defendant's motion for reconsideration.

In its motion for reconsideration, defendant cited the case of *Sanders v. City of St. Louis*, 303 S.W.2d 925 (Mo. 1957). In *Sanders*, the Court held that an ordinance that modified the grade or rank of certain classified city employees, thereby resulting in a salary reduction, did not violate the city charter. *Id.* at 927-28. However, there were some significant differences between the 1957 charter of the city of St. Louis and the current charter of the city of Springfield, Missouri. For example, Section 26 of Article XVIII of the St. Louis charter provided in part: "The titles and rates of pay of any positions in the classified service, as set forth in any ordinance or appropriation now or hereafter in effect, shall be deemed

to be permissive only, . . . but not as mandatory in requiring that such titles shall be used to designate such positions to the exclusion of all others or that payments shall be made at such rates, irrespective of the true nature of the positions existing by virtue of such authority and whether such titles and rates are appropriate to the positions as actually constituted." *Id.* at 928-29. On the other hand, there is no language in the Springfield charter that indicates that ranks or salaries of classified employees are permissive and subject to change. Article VI, Section 6.11 of the Springfield Charter provides in part: "No person in a classified service . . . ***shall be*** appointed, promoted, ***reduced***, removed, advanced, or ***retarded*** on ***any basis for any reason*** other than qualifications, merit, and fitness for the service or lack thereof. . . ." (emphasis ours). The underlined language strongly suggests that the section is mandatory, not permissive.

Although this Court does not have the entire 1957 charter of the City of St. Louis, it appears that said charter referred to only "removal from office." The Missouri Supreme Court noted that "demotion" in rank does not constitute a "removal from office" necessarily. *Sanders* at 929. However, in addition to removal from service, Section 6.11 of the Springfield charter refers to reduction and retardation in rank. The parties do not dispute that plaintiffs in the instant case have been reduced to the rank of corporal by General Ordinance No. 88-16. This reduction in rank clearly violates Section 6.11. Therefore, as stated in this Court's April 10, 1990 order, plaintiffs have been deprived of property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and defendant is permanently enjoined from enforcing Council Bill No. 88-16 and the terms of defendant's general ordinance, section 2-29.1 of the City Code of the City of Springfield, Missouri, as amended by Council Bill 88-16.

It is

ORDERED that defendant's motion for reconsideration is denied; and it is further

ORDERED that defendant's motion for stay of injunction pending further proceedings is denied.

/s/Russell G. Clark

RUSSELL G. CLARK, JUDGE
UNITED STATES DISTRICT COURT

Date: April 17, 1990

Supreme Court, U.S.
FILED
JAN 22 1992
OFFICE OF THE CLERK

(2)

No. 91-981

In The

Supreme Court of the United States

October Term, 1991

JERRY CODAY, et al.,

Petitioners,

v.

CITY OF SPRINGFIELD, MISSOURI,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

NANCY DALE (KELLEY) YENDES,
Counsel of Record

DENNIS E. BUDD
OFFICE OF THE SPRINGFIELD,
MISSOURI CITY ATTORNEY
830 Boonville, P.O. Box 8368
Springfield, Missouri 65801
(417) 864-1645

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a substantial federal question is raised by municipal police detectives who claim that the Springfield, Missouri city charter and state law prohibit the city council from abolishing police detective job titles.

2. Whether the Springfield, Missouri city charter or state law create a constitutionally-protected property interest in police detective job titles.

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CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

Petitioners complain of General Ordinance No. 3896, enacted by the Springfield, Missouri City Council on February 15, 1988.

Relevant provisions are as follows:

General Ordinance No. 3896:

> *Section 1* – That Section 2-29.1 of the Springfield City Code known as the Salary Ordinance relating to various salary rates and pay grades for various job titles within the City service as contained in the LES schedules is hereby amended by deleting the following job titles:
>
> | Grade | Classification |
> |---|---|
> | LES-6 | Police Detective |
> | LES-7 | Detective (Polygraph Examiner) |
>
> *Section 2* – Police Detective. Any person holding the position of Police Detective on the effective date of this ordinance shall be transferred to the classification of Police Corporal. If a person holding the position of Police Detective on the effective date of this ordinance thereafter holds a position other than that of Police Corporal, then such person's pay shall be the same as that authorized for the other position. In recognition of the many years of experience and seniority in the performance of police detective work the City Council hereby determines that employees who held the position of Police Detective on the effective date of this ordinance shall be granted additional compensation while holding the position of Police Corporal for a

period of four years from the passage of this ordinance. The rate of pay for a person holding the position of Police Detective on the effective date of this ordinance shall remain fixed at the rate established for the position of Police Detective prior to the passage of this ordinance until such time as the City Council adjusts the rate of pay. The City Council states that it intends to grant additional compensation to such employees by authorizing wage increases that it would normally give to other employees in the police department in accordance with the pay policy of the city in effect at that time. At the end of four years from the date of passage of this ordinance the wages of any employee who was a Police Detective on the effective date of this ordinance who continues to hold the position of Police Corporal shall thereafter remain fixed at the rate then established for employees who were grandfathered under this ordinance without benefit of any further wage increases, including cost of living increases, until the rate of pay for the position of Corporal equals or exceeds the rate established for the employee who was grandfathered by this ordinance.

Section 3 – Detective (Polygraph Examiner). Any person holding the position of Detective (Polygraph Examiner) on the effective date of this ordinance shall be transferred to the classification of Police Corporal. If a person holding the position of Detective (Polygraph Examiner) on the effective date of this ordinance thereafter holds a position other than that of Police Corporal, then such person's pay shall be the same as that authorized for the other position. In recognition of the many years of experience and seniority in the performance of police detective

work the City Council hereby determines that employees who held the position of Detective (Polygraph Examiner) on the effective date of this ordinance shall be granted additional compensation while holding the position of Police Corporal for a period of four years from the passage of this ordinance. The rate of pay for a person holding the position of Detective (Polygraph Examiner) on the effective date of this ordinance shall remain fixed at the rate established for the position of Detective (Polygraph Examiner) prior to the passage of this ordinance until such time as the City Council adjusts the rate of pay. The City Council states that it intends to grant additional compensation to such employees by authorizing wage increases that it would normally give to other employees in the police department in accordance with the pay policy of the city in effect at that time. At the end of four years from the date of passage of this ordinance the wages of any employee who was a Detective (Polygraph Examiner) on the effective date of this ordinance who continues to hold the position of Police Corporal shall thereafter remain fixed at the rate then established for employees who were grandfathered under this ordinance without benefit of any further wage increases, including cost of living increases, until the rate of pay for the position of Corporal equals or exceeds the rate established for the employee who was grandfathered by this ordinance.

Section 4 – This ordinance shall be in full force and effect from and after passage.

Passed at meeting: FEB 15, 1988

STATEMENT OF THE CASE

The Petition contains some erroneous statements of fact, including the following:

(1) at p. 5, the statement is made that petitioner Upp is an employee of respondent. Correction: Petitioner Upp retired from the City service while this suit was pending in the courts below.

(2) at p. 5, the statement is made that the Springfield City Charter was adopted in 1978. Correction: The Springfield City Charter was adopted by vote of the citizens of Springfield, Missouri on March 17, 1953, and has been amended from time to time.

(3) at p. 5, the statement is made that "petitioners were . . . reduced in compensation to the lower LES-5 category without having received any written notice of the reductions . . . . " Correction: Petitioners were not reduced in compensation. See Sections 2 and 3 of General Ordinance No. 3896 (erroneously referred to in the Petition as "Council Bill No. 86-16"), providing that petitioners are grandfathered at their existing rates of pay and that they will continue to receive authorized increases in compensation for a period of four years following enactment of the ordinance.

REASONS FOR DENYING THE WRIT

1. Because the controversy in this case is resolved by construing the provisions of the Springfield, Missouri city charter, no substantial federal question is raised, and the case does not present a special or important issue requiring the consideration of this Court.

The nature of this case is such that an opinion rendered by this Court would of necessity be limited in its application to the specific facts involved. The simple question presented is whether the Springfield City Charter (the "Charter") contains a limitation which abridges the power of the Springfield City Council to abolish positions within the classified service of the City. Judicial construction of the Springfield City Charter does not present a substantial federal question under 28 U.S.C. Section 1343. Under the facts presented, there are no special or important reasons for the Court to exercise its discretion to consider this case, as none of the criteria set forth in Supreme Court Rule 10.1 have been met.

A. No substantial federal question is presented.

Petitioners brought this action pursuant to 42 U.S.C. Section 1983 in the U.S. District Court, Western District of Missouri, alleging a violation of their due process rights. Section 1983 does not itself confer jurisdiction on the federal courts; rather, a party must demonstrate the existence of a substantial federal question in order to establish jurisdiction. *Hagans v. Lavine*, 415 U.S. 528, 536-537, 94 S.Ct. 1372, 1378-79, 39 L.Ed.2d 577, 587 (1974).

In *Goldsmith v. Mayor and City Council of Baltimore*, 845 F.2d 61 (4th Cir. 1988), the Fourth Circuit considered a fact situation very similar to this case. Plaintiff Ronny Goldsmith claimed her due process rights were violated when the City of Baltimore enacted an ordinance which abolished the city's Office of Financial Review, of which Goldsmith was the tenured director, and created in its stead the Office of Councilmanic Services, which did not provide civil service tenure. The ordinance grandfathered Goldsmith into the director position of the newly-created Office of Councilmanic Services, *id.* at 63, and "her duties and responsibilities, and her benefits and remuneration did not change," *Id.* at 64.

The Fourth Circuit concluded that the case did not present a substantial federal question because "Approached from any angle, this case merely represents a conflict between a public officer and the city council which created her position. The Supreme Court has ruled time and time again that, under the federal constitution, a legislative body, including municipal councils, has the unfettered authority to create, alter and abolish such positions." *Id.* at 65.

There is no substantive difference between the claims made by petitioners and the claims presented in *Goldsmith, supra.* Petitioners have never disputed that the City Council is empowered by the Charter to create job titles, but contend that the Charter prohibits the City Council from abolishing job titles it has created and the District Court apparently agreed. Appendix to Petition, pp. 17a-18a; p. 22a. The Eighth Circuit rejected this contention, noting that "Indeed, if we followed the rationale of the district court, all city employees in the classified

service would have a constitutionally-protected property interest in their jobs, job titles, job duties, etc., which for the duration of their employment, could not be abolished or altered in any way by the city's legislative body." Appendix to Petition, p. 6a.

B. There are no special or important reasons for granting a writ.

It is significant that under the ordinance complained of, General Ordinance 3896 (erroneously referred to in the Petition as "Council Bill 86-16") petitioners have suffered no interruption of employment, no reduction in compensation and no change in job duties, and therefore have no damages. The lack of damages serves to underscore the point that there are no special or important reasons for granting a writ.

For their first reason for granting the writ, petitioners assert that the decision of the Eighth Circuit "raises important and unique problems in identifying constitutionally-protected property interests," (Petition, p. 11). Respondent suggests there are no "important and unique problems" of constitutional magnitude involved in this case. In order to resolve the case, it is only necessary to apply standard principles of statutory construction under state law to provisions of the Springfield City Charter. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

For their second reason for granting the writ, petitioners assert that "[t]he questions raised in this case are of nationwide importance." Petition, p. 17. Petitioners speculate that the opinion of the Eighth Circuit will "inspire city councils and other local legislative bodies to

save money by reducing the emoluments of public service," Petition, p. 18. Assuming *arguendo* that "the vast majority of these city government employees . . . are covered by some sort of civil service protections," (Petition, p. 17), petitioners do not explain how such abstract information supports their claim that the opinion of the Eighth Circuit signals the beginning of the end of civil service protections for municipal employees. Regardless of how many municipal employees in the United States are entitled to "some sort of civil service protections", whatever that means, the fact remains that the questions raised in this case turn entirely on the construction to be placed on the Springfield City Charter. Each individual municipality across the country is organized according to applicable state law, and there are undoubtedly hundreds if not thousands of individual municipal charters. An opinion by this Court could have little if any precedential value beyond the unique provisions of the Springfield City Charter. Petitioners are asking the Court to grant certiorari based on unfounded speculation, rather than on relevant facts and law.

Petitioners conclude their argument by alluding to election results reported in the Springfield News-Leader on November 6, 1991, Petition, p. 18. This information demonstrates once again the parochial nature of the dispute in this case. Petitioners imply that the defeat of the proposed charter amendment indicates voter approval of their claims in this action; Petition, p. 18. It is safe to assume that if the voters of the City of Springfield believe that petitioners and those similarly situated in the classified service of the City should be entitled to guaranteed,

lifetime tenure in job positions that can never be legislatively altered or abolished, then the voters can initiate such reforms by amending the City Charter to specifically so provide; or the voters can prevail upon the City Council to repeal General Ordinance No. 3896; or petitioners themselves may seek redress through the City Council by asking that General Ordinance No. 3896 be revised or repealed. The remedy for petitioners' grievance is, and should be, through the local political process rather than the courts.

2. The Eighth Circuit correctly determined that the Springfield City Charter and state law do not create a constitutionally-protected property interest in the "Detective" and "Detective-Polygraph Examiner" job titles.

A. The state cases cited by petitioners do not create a property interest.

Petitioners focus their "search for state law" on four Missouri appellate decisions: *Moore v. Damos*, 489 S.W.2d 465 (Mo.App. 1972); *Scism v. Long*, 280 S.W.2d 481 (Mo.App. 1955); *Davis v. Long*, 360 S.W.2d 307 (Mo.App. 1962); and *Heidebur v. Parker*, 505 S.W.2d 440 (Mo.App. 1974). Petitioners' reliance on these cases as a basis for seeking relief in this Court is misplaced for several reasons.

In the first place, none of these four cases were decided by the state court of last resort; namely, the Missouri Supreme Court. Accordingly, it cannot be said that the Eighth Circuit "has decided a federal question in a way in conflict with a state court of last resort,"

Supreme Court Rule 10.1.(a); nor that "a state court of last resort has decided a federal question in a way that conflicts with the decision . . . of a United States court of appeals", Supreme Court Rule 10.1(b). Indeed, in rendering its opinion the Eighth Circuit expressly relied on the analysis of the Missouri Supreme Court in the case of *Sanders v. City of St. Louis*, 303 S.W.2d 925 (Mo. 1957), which specifically dealt with the municipal charter issue here presented. The opinion of the Eighth Circuit is thus in harmony with the declaration of the Missouri Supreme Court on the precise issue involved.

Next, not one of the four cases cited by petitioners involved a claim that a legislative body had deprived a public employee of a protected property interest without due process of law. Even the District Court conceded that the cases cited by petitioners involved only "terminations or reductions in rank for disciplinary reasons". Appendix to Petition, p. 17a.

Furthermore, petitioners completely misconstrue the legal application of the "emoluments" language found in the four cases cited, by taking out of context the phrase " 'a police officer, when he is commissioned, acquires a right or title to the office and its emoluments and such privilege is entitled to protection,' " (Petition, p. 12). Petitioners intone that this singular judicial statement, in and of itself, confers "a property interest on police officers when they are commissioned" in every Missouri city "where officers can only be discharged for cause," Petition, p. 12. Petitioners are mistaken. The property interest discussed in each of the cases cited is not created by judicial declaration; it is created and defined by statutory provisions which give rise to the property interest.

The "emoluments" phrase relied on by petitioners originated in *Scism v. Long, supra,* 280 S.W.2d at 483, a case in which the procedural rights of a St. Louis city police officer in an administrative disciplinary proceeding were at issue. As the opinion clearly states, the city police officer involved held a property interest in his job by virtue of state statutes, Section 84.150 RSMo. (1949) *et seq.*, which provided *inter alia* that City of St. Louis police officers shall be "subject to removal only for cause after a hearing by the board [of Police Commissioners]," *Id.* at 483.

The full context of the phrase upon which petitioners rely is thus seen to be that "It appears from the foregoing statutes that by appointment a police officer acquires a right or title to the office and emoluments which the General Assembly has recognized as a valuable interest or privilege entitled to protection." 280 S.W.2d at 483. Thus, the opinion in *Scism v. Long* did no more than declare the procedural due process rights of St. Louis city police officers in disciplinary proceedings under ch. 84 RSMo. (1949). The case does not stand for the proposition that all Missouri municipal police officers acquire property interests in their jobs merely by the act of being commissioned, as petitioners insist. The source of the property interest was the statute, and not the declaration of the court.

For the same reasons, the remaining cases cited by petitioners do not aid their cause. *Davis v. Long,* 360 S.W.2d 307, *supra,* involved a police lieutenant of the City of St. Louis Police Department who was suspended without pay for misconduct, and subsequently sought reinstatement with reimbursement for loss of pay during the

period of suspension. The court found that the police lieutenant had a property interest in his job and the "emoluments" thereof (pay, in his case) because of state statutes, sections 84.150 and 84.170 RSMo. (1959), *Id.* at 311, 312. The opinion in *Davis* clearly does not stand for the proposition that the police lieutenant had a property interest by virtue of judicial declaration; rather, the court found that plaintiff's property and procedural rights were created by statute, as did the court in *Scism v. Long, supra.*

In *Moore v. Damos,* 489 S.W.2d 465, *supra,* it is clear that the source of the property interest held by the plaintiff police officer in his job was Article VII of the city charter of University City, Missouri, by virtue of which plaintiff was a member of the classified service of the city. "Article VII, Sec. 52(4) of the City Charter of the City of University City, Missouri, requires the Board to hear appeals from disciplinary actions and Sec. 59 of the same Article affords any employee under the 'classified service' who is discharged a public hearing before the Board. Plaintiff is an employee within the 'classified service.' Article VII, Sec. 54(2) of the Charter of the City of University City, Missouri." *Id.* at 468. The reference at p. 468 of the opinion to the "rank, compensation and emoluments" language from *Scism v. Long* is thus placed in context as relating to the procedural rights of the employee in disciplinary proceedings, rather than as a judicial declaration creating the employee's property rights in his job.

In *Heidebur v. Parker,* 505 S.W.2d 440, *supra,* the St. Louis County Board of Police Commissioners found plaintiff Heidebur guilty of misconduct and sustained his dismissal by the Superintendent of Police for St. Louis

County. The issue on appeal concerned which party had the burden of proof in appeals hearings on disciplinary actions before the Board of Police commissioners. The court determined that a Board rule which obligated the appealing employee to proceed first with the evidence denied due process to the employee and was invalid. *Id.* at 444. The source of Heidebur's property interest, and for his right of appeal before the Board, was the St. Louis County Charter (" . . . under provisions of the County Charter, the Board hears appeals on disciplinary actions taken by the Superintendent"; *Id.* at 443). The reference to the "rights and emoluments" language of *Moore v. Damos* found at p. 444 of the opinion clearly relates to the procedural burden of proof issue that was before the court, rather than indicating the source of Heidebur's property interest.

Petitioners' charge that the Eighth Circuit deliberately ignored "authoritative state court rulings that define the protected contours of a property interest," Petition, pp. 12-13, is unsupported. Petitioners have obviously misread the very cases they claim the Eighth Circuit has ignored, besides which, petitioners cannot possibly know that the Court in fact "ignored" the cases. Furthermore, petitioners fail to acknowledge that the Eighth Circuit did in fact rely on the singular authoritative ruling by the highest state court that was applicable on the facts of this case, that being the opinion of the Missouri Supreme Court in *Sanders v. City of St. Louis, supra.*

B. The Springfield City Charter does not abridge the power of the City Council to alter and abolish positions within the classified service.

The conclusion reached by the Eighth Circuit was "that no constitutionally protected property interest existed in the employee's positions as detectives." Appendix to Petition, p. 5a. In analyzing the Springfield City Charter, the Court noted the broad grant of legislative authority to the City Council in Sections 1.2 and 1.3 of the Charter, and the express powers granted the City Council "over the organization and operations of the police department" in Section 4.4 of the Charter. Appendix to Petition, pp. 5a-6a. The Court also called attention to Section 19.7 of the Charter, which "expressly provides the city council with the power to establish the maximum and minimum salaries for employees in the classified service of the city," Appendix to Petition, p. 6a.

The Court found that "Sections 6.10 and 6.11 – which are contained within Article VI of the charter, labeled 'Department of Personnel' – apply only to administrative actions, such as promotion or discipline of employees. They do not limit or preclude the city council's legislative authority to make necessary policy and budget decisions; they do not somehow override the express authority for the city council's actions in sections 4.4 and 19.7; and, thus, they do not create a constitutionally-protected property interest that prohibits the city council from passing the ordinance at issue in this case." Appendix to Petition, pp. 6a-7a. The Court found support for its charter analysis in *Sanders v. City of St. Louis, supra,* in which the Missouri Supreme Court considered a similar municipal

charter construction issue, and reached essentially the same conclusions.

Petitioners' "Charter misinterpretation" and "legislative-administrative distinction" arguments (Petition, pp. 13-16), do not detract from the analysis of the Eighth Circuit. The sum and substance of petitioners' argument appears to be that they and the District Court have read the City Charter correctly, and the Eighth Circuit has not. The suggestion is made that Sections 6.10 and 6.11 of the City Charter "fit neatly into the Missouri decisional law respecting a police officer's 'right or title' to the office, including the 'emoluments' of ranks and compensation attached thereto," Petition, p. 14. However, as discussed *supra*, the Missouri decisional law on which petitioners purport to rely does not support their position in any event, as it is clear petitioners have misconstrued those cases.

It is significant that nowhere in their argument do petitioners address or attempt to distinguish the controlling case of *Sanders v. City of St. Louis, supra*. *Sanders* is the authoritative ruling by the highest state court on the state law question of the distinction that exists between administrative disciplinary actions on the one hand, and legislative determinations of municipal policy and budget decisions under a municipal home rule charter on the other hand. *Sanders* perfectly supports the conclusions reached and the judgment entered by the Eighth Circuit.

CONCLUSION

For the foregoing reasons, this case does not present questions which require or merit the consideration of this Court, and the Petition For a Writ of Certiorari to review the judgment and opinion of the Eighth Circuit should be denied.

Respectfully submitted,

NANCY DALE (KELLEY) YENDES,
Counsel of Record

DENNIS E. BUDD
OFFICE OF THE SPRINGFIELD,
MISSOURI CITY ATTORNEY
830 Boonville, P.O. Box 8368
Springfield, Missouri 65801
(417) 864-1645

Attorneys for Respondent